

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 61862-8-I
	)	
v.	)	
	)	
PHAT THANH NGUYEN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 20, 2009
	)	

Dwyer, A.C.J. — Phat Thanh Nguyen<sup>1</sup> appeals from the judgment entered on a jury’s verdict finding him guilty of possession with intent to manufacture or deliver cocaine. He contends that the trial court erred by denying his motion for a mistrial after one of the sheriff’s deputies who arrested Nguyen improperly testified that he had investigated Nguyen’s history. However, Nguyen fails to show that this testimony was so prejudicial as to deny him a fair trial. Accordingly, we affirm.

I

Nguyen was charged with possession with intent to manufacture or deliver cocaine, in violation of RCW 69.50.401(1), (2)(a). Pursuant to ER 404(b) and ER 609, Nguyen moved before trial to exclude evidence of any of his prior bad acts. The trial court entered an oral ruling specifying that witnesses were not to testify about any prior convictions or about “anything that would allude to

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<sup>1</sup> In their briefing, the parties refer to the appellant as Nguyen. Thus, we will do so as well.

there having been other convictions.”

At trial, two King County sheriff’s deputies testified that they clearly saw Nguyen in a known drug-trafficking area hand a substance consistent with the appearance of crack cocaine to another man in exchange for cash. According to the deputies’ testimony, Nguyen and the other man fled when the deputies approached them. The deputies further testified that Nguyen, while fleeing, dropped the jacket that he had been wearing during the observed transaction. The deputies testified to finding crack cocaine split into pieces and packaged in a used chewing gum container inside of Nguyen’s jacket. The State’s forensic expert testified that the recovered substances amounted to 25.7 grams of cocaine. The deputies also testified that, after subduing and arresting Nguyen, they recovered a knife, a crack pipe, and cash from Nguyen’s person.

After testifying as to the circumstances of Nguyen’s arrest, one of the deputies stated, in response to a question about whether he made any further investigation, “I did check into Mr. Nguyen’s history.” Defense counsel objected, and the prosecution conceded that the deputy’s statement was improper. The trial court sustained the defense’s objection and instructed the jury to disregard the deputy’s statement.<sup>2</sup> Nguyen then moved for a mistrial on the ground that

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<sup>2</sup> The following exchange took place between the prosecutor and the deputy:

- Q. Did you do any further investigation in this case?  
A. No.  
Q. Now, I want to talk about basically the entire time you observed the defendant.  
A. Actually I did do a small amount of investigation after that.  
Q. Okay.

the deputy's statement about having checked into Nguyen's history was prejudicial because it implied that Nguyen had a criminal history. The trial court, however, denied the motion, ruling that the deputy's statement did not necessarily imply that Nguyen had a criminal history. The trial court instructed the jury before closing arguments that it must not consider any evidence during its deliberations that the court had ruled was inadmissible or had instructed the jury to disregard. The jury subsequently found Nguyen guilty as charged.

II

Nguyen contends that the trial court erred by denying his motion for a mistrial. We disagree.

The trial court is in the best position to assess the prejudice resulting from circumstances at trial. Thus, we review a trial court's decision to grant or deny a motion for a mistrial for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court should declare a mistrial when an irregularity in the trial proceedings, viewed in light of all of the evidence, is so prejudicial as to deprive the defendant of a fair trial. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). In determining the effect of a trial irregularity, we consider "(1) its seriousness; (2) whether it involved cumulative

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- A. I did check into Mr. Nguyen's history.  
[Defense Counsel]: Objection, Your Honor.  
[Prosecutor]: Not relevant.  
THE COURT: The jury can disregard the comment of the officer and continue with your questioning.

Report of Proceedings (April 23, 2008) at 31-32.

evidence; and (3) whether the trial court properly instructed the jury to disregard it.” State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)); see also State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165–66, 659 P.2d 1102 (1983)).

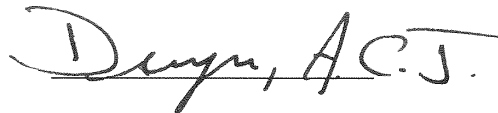
We see little significance in the deputy’s testimony that he investigated Nguyen’s history. The deputies’ other testimony and that of the State’s forensic expert provided a sufficient basis for the jury to find Nguyen guilty as charged. This situation differs from that presented in Escalona, 49 Wn. App. at 255, where we held that a mistrial should have been declared after a witness, who had testified inconsistently about the incident underlying the criminal charge, improperly testified that Escalona had committed a crime in the past similar to the one with which he was charged. Here, the deputy did not testify that Nguyen had previously been charged with or convicted of drug offenses. He did not testify as to what Nguyen’s criminal history entailed or that Nguyen even had a criminal history. Thus, the deputy’s comment did not invite the jury to infer that Nguyen had acted in conformity with a criminal character as demonstrated by past conduct. Cf. Escalona, 49 Wn. App. at 256 (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

Further, the deputy’s testimony was isolated, and the trial court sustained defense counsel’s immediate objection to it. Nguyen argues that the trial court

failed to protect his right to a fair trial because, at the time of the objection, the trial court stated only that the jury “can disregard the comment.” However, the trial court’s instructions before closing arguments clarified that the jurors were not to consider the stricken testimony. The jury is presumed to have followed this instruction. Weber, 99 Wn.2d at 166. Nguyen provides no basis for us to conclude that the trial court’s instruction was ineffective in remedying any potential prejudice to him resulting from the deputy’s errant testimony.

Moreover, the deputy’s comment was not “inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors” so that no instruction could have cured the error. Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). The trial court did not abuse its discretion in denying Nguyen’s motion for a mistrial.

Affirmed.

A handwritten signature in black ink, reading "Dwyer, A.C.J." with a horizontal line underneath the name.

We concur:

Schindler, C.      Ajd, J.